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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

CITIZENS AGAINST C.R.A.P. et al.,

Plaintiffs and Appellants,

v.

CITY OF FRESNO et al.,

Defendants and Respondents;

DENNIS BALAKIAN et al.,

Real Parties in Interest and Respondents.

F042766

(Super. Ct. No. 01 CE CG 04138)

OPINION

APPEAL from a judgment of the Superior Court of Fresno County. R. L. Putnam, Judge.

Law Offices of Richard L. Harriman, Richard L. Harriman; Johnson & Beck, Mark D. Johnson; Dean B. Gordon for Plaintiffs and Appellants.

Hilda Cantú Montoy, City Attorney, Michael P. Slater, Assistant City Attorney, and Jeffrey C. Heeren, Deputy City Attorney, for Defendants and Respondents.

Lang, Richert & Patch and Victoria J. Salisch for Real Parties in Interest and Respondents.

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Petitioners Citizens Against C.R.A.P. and Randy Tosi, doing business as Bruno's Iron and Metals (petitioners), filed a mandamus petition against the City of Fresno and the City of Fresno Planning Commission (City). Petitioners alleged that the City failed to comply with the California Environmental Quality Act (CEQA)[1] in approving a conditional use permit (CUP) issued to real party in interest Dennis Balakian, individually and doing business as West Coast Waste, Inc. (WCW), for the recycling of untreated wood and clean green materials on an industrial site in Fresno, California.

The trial court denied the petition, finding that the City acted in a manner as required by law and did not abuse its discretion. We disagree and reverse.

PROCEDURAL AND FACTUAL HISTORIES

In approximately 1996, Recycling Unlimited, Inc. (RUI), commenced the operation of a solid waste transfer station and recycling center on a site located at 3077 South Golden State Frontage Road, in Fresno, California. The area was zoned for heavy industrial use. RUI did not have a permit to operate at the site, and the business accepted all kinds of wet trash and refuse materials. RUI's operations at the site created problems in public health and safety.

The City pursued an enforcement action against RUI to cease its operations. On April 18, 2000, the trial court issued a preliminary injunction enjoining RUI, the property owners and the lessee from operating the site in violation of the Fresno Municipal Code and ordering RUI to remove the refuse, garbage and other solid waste from the property. RUI failed to clean up the property.

In February 2001, WCW, which had no business association with RUI, took possession of the property with the consent of the property owners. WCW originally

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[1]CEQA is codified at Public Resources Code section 21000 et seq. All statutory references are to the Public Resources Code unless otherwise indicated.

substituted itself in place of RUI on an application RUI submitted for a CUP to operate on the site. However, on April 26, 2001, WCW submitted its own application for a CUP to develop the site with a material sort facility and transfer station to receive and process industrial, commercial and residential recyclable materials (the project). The application did not include cleanup of the site, which was required by court order regardless of whether or not a CUP was issued for WCW's operations on the site.

During the time the application was pending, WCW commenced cleanup efforts on the site. WCW brought no new materials onto the site and spent in excess of $500,000 to clean it up. By June 15, 2001, WCW, with the assistance of the City, had modified the project to eliminate the transfer station and composting and include only the recycling of untreated wood and clean green materials consisting of grass clippings, shrub branches and tree trimmings. The project no longer included the proposed recycling of demolition materials, industrial and commercial loads, or solid waste.

On July 6, 2001, the City prepared an initial study, which provided the following:

> "Project Description:
>
> "[WCW] is applying for … [a CUP] which would authorize wood grinding and clean green material recycling on the project site.…
>
> "The applicant proposes recycling wood waste and clean green material by accepting products delivered to the site from landscapers, gardeners, roofing contractors and homeowners such as clean wood and green waste from tree trimmings and excess clean wood from building contractors. The City … has established the definition of 'clean green material' as 'only landscape trimming materials (grass clippings, shrub branches) and tree trimmings.'" [¶] … [¶]
>
> "Determination
>
> "On the basis of this initial evaluation, it is determined that the proposed project is consistent with all applicable City plans and policies and conforms to all applicable zoning standards and requirements. It is further determined that the proposed project will not have a significant effect on the environment. This is based upon the mitigation measures required as

> conditions of project approval for the subject special permit, which have been added to the project as defined, are conditions upon which a mitigated negative declaration can be recommended."

The City prepared a mitigated negative declaration and gave notice of a public hearing for approval of the project. In response, several neighbors and interested parties submitted letters objecting to the project. Many of the objections related to prior operation of the site by RUI. Following a public hearing on October 17, 2001, the City Planning Commission adopted Resolution No. 11630, approving WCW's application for a CUP subject to certain enumerated conditions.

On December 3, 2001, petitioners filed a petition for writ of administrative mandamus challenging the City's approval of the project. The trial court denied the petition, determining that the record contained substantial evidence to support the findings, decisions and actions of the City.

DISCUSSION

Petitioners argue that the court erred in denying their petition for writ of administrative mandamus based on a number of procedural and substantive CEQA violations. We first examine general CEQA principles and the applicable standard of review.

In *Laurel Heights Improvement Assn. v. Regents of University of California* (1993) 6 Cal.4th 1112 (*Laurel Heights II*), the California Supreme Court explained the purposes and framework of the CEQA review process:

> "We have repeatedly recognized that the EIR [environmental impact report] is the 'heart of CEQA.' [Citations.] 'Its purpose is to inform the public and its responsible officials of the environmental consequences of their decisions *before* they are made. Thus, the EIR "protects not only the environment but also informed self-government." [Citation.]' [Citation.] To this end, public participation is an 'essential part of the CEQA process.' [Citations.]
>
> "With certain limited exceptions, a public agency must prepare an EIR whenever substantial evidence supports a fair argument that a proposed

> project 'may have a significant effect on the environment.' [Citations.] '"Significant effect on the environment" means a substantial, or potentially substantial, adverse change in the environment.' [Citations.]" (*Laurel Heights II*, *supra*, 6 Cal.4th at p. 1123, fn. omitted.)

We explained the standard of review for CEQA issues in *Protect Our Water v. County of Merced* (2003) 110 Cal.App.4th 362, 370-371:

> "'In reviewing an agency's determination under CEQA, a court must determine whether the agency prejudicially abused its discretion. [Citation.] Abuse of discretion is established if the agency has not proceeded in a manner required by law or if the determination is not supported by substantial evidence.…' [¶] … [¶]
>
> """On appeal, the appellate court's 'task … is the same as that of the trial court: that is, to review the agency's actions to determine whether the agency complied with procedures required by law.' [Citation.] The appellate court reviews the administrative record independently; the trial court's conclusions are not binding on it. [Citations.]" [Citation.]' [Citations.]" (See also *Stanislaus Natural Heritage Project v. County of Stanislaus* (1996) 48 Cal.App.4th 182, 192-193.)

Petitioners initially argue that the City violated CEQA by failing to make the requisite findings to be incorporated in Resolution No. 11630. Specifically, petitioners contend that Resolution No. 11630 makes no reference to compliance with CEQA, the adoption of an environmental assessment, the exercise of the City's independent judgment, or the adoption of a mitigation reporting or monitoring program. Petitioners also complain that exhibits referred to in the resolution are not supplied in the record and there is no reference to adoption of the mitigated negative declaration. Finally, petitioners note that the City violated the provisions of CEQA by not filing a notice of determination. Petitioners' points are well-taken.

Resolution No. 11630 approved the project, subject to the following conditions:

> "1. Development shall take place in accordance with Exhibit A dated May 1, 2001, Exhibit B dated June 18, 2001 and Exhibit L dated September 19, 2001.

"2. Development shall take place in accordance with the Special Permit Conditions of Approval dated July 9, 2001.

"3. Development shall take place in accordance with the General Conditions of Approval.

"4. Within 12 months of approval of the conditional use permit application, the recycling facility shall be reviewed for compliance with the Special Permit Conditions of Approval in the application."

Not only are Exhibits A, B and L not attached to the resolution, we find them nowhere in the administrative record. The Special Permit Conditions of Approval are similarly not attached to the resolution; however, we are able to locate them in the record. We cannot locate the referenced General Conditions of Approval. The trial court noted that the pertinent documents were not attached, but concluded the deficiency did not appear to be a "substantial omission." On this record, it is impossible to determine the gravity of the omission, since we cannot even establish the nature of the missing documents.

The deficiency is magnified by the custodian's certificate verifying that we have the "full, true, and correct copy of the original of … [Resolution No. 11630] now on file in the Planning and Development Department." It would appear then that the public also does not have access to the relevant documents. We find it impossible to review the City's approval of the project without the pertinent documents upon which the City relied in its approval. (See 2 Kostka & Zischke, Practice Under the Cal. Environmental Quality Act (Cont.Ed.Bar 2003) § 23.46, pp. 963-964 [judicial review in administrative mandamus proceeding limited to review of evidence in administrative record]; Code Civ. Proc., § 1094.5, subd. (e).)

Furthermore, both the resolution and the minutes of the October 17, 2001, City Planning Commission meeting fail to identify whether the City adopted the mitigated negative declaration. The City was required to formally adopt the proposed mitigated negative declaration. (State CEQA Guidelines, § 15074 [decisionmaking body must

consider mitigated negative declaration and determine whether to adopt it before approving project].[2]) Despite the deficiencies in the resolution and in the minutes, we note that the transcript of the meeting reveals that a motion to adopt the mitigated negative declaration was made and passed.

Finally, we fail to find any notice of determination prepared or filed by the City. When a lead agency makes a discretionary decision to approve a project on the basis of a negative declaration or an EIR, it *must* file a notice of determination. (§§ 21108, subd. (a), 21152, subd. (a); Guidelines, §§ 15075, subd. (a), 15094, subd. (a).) The notice of determination for a project approved with a mitigated negative declaration must include, inter alia, identification of the project, a brief description of the project, the date of approval, the agency's determination that the project will not have a significant effect on the environment, and the address where a copy of the mitigated negative declaration may be examined. (Guidelines, § 15075, subd. (b); see also Guidelines, § 15094, subd. (a).) If the lead agency is a local agency (as is the case here), the notice of determination must be filed, within five working days after the approval becomes final, with the clerk of the county in which the project will be located. (§ 21152, subd. (a);

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[2]The State CEQA Guidelines are set forth in title 14, section 15000 et seq., of the California Code of Regulations. All further citations will be referred to as Guidelines.

Section 15000 of the Guidelines states: "The regulations contained in this chapter are prescribed by the Secretary for Resources to be followed by all state and local agencies in California in the implementation of [CEQA].… [¶] … [¶] These Guidelines are binding on all public agencies in California." The California Supreme Court has stated on several occasions that "'at a minimum, … courts should afford great weight to the Guidelines except when a provision is clearly unauthorized or erroneous under CEQA.'" (*Laurel Heights II*, *supra*, 6 Cal.4th at p. 1123, fn. 4; *Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 564, fn. 3; *Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 391 fn. 2 (*Laurel Heights I*).)

Guidelines, §§ 15075, subd. (d), 15094, subds. (a), (d).) Proper filing and posting of a notice of determination for a project commences the 30-day statute of limitations for a legal challenge to the agency's approval of a project under CEQA. (§ 21167, subds. (b), (c); Guidelines, §§ 15075, subd. (e), 15094, subd. (f).)

We recognize that the filing of a notice determination is designed to commence the limitations period, which is not at issue in this case. (See § 21167, subdivision (b); Guidelines, § 15112, subd. (c)(1).) However, the purpose of CEQA is "to compel government at all levels to make decisions with environmental consequences in mind." (Guidelines, § 15003, subd. (g); see also *Bozung v. Local Agency Formation Com.* (1975) 13 Cal.3d 263, 274-276.) It is unclear from this record whether the City did so. As we recently observed in *Protect Our Water v. County of Merced*, *supra*, 110 Cal.App.4th at pages 365 and 373: "[W]e have observed a pattern of CEQA cases with poorly prepared records making review difficult, if not impossible.… [¶] … [¶] … The consequences of providing a record to the courts that does not evidence the agency's compliance with CEQA is severe—reversal of project approval."

As a result of the above deficiencies, we find that the City failed to act in a manner as required by law and reverse the judgment. In light of our conclusion, it is unnecessary to address petitioners' remaining contentions.

DISPOSITION

The judgment is reversed. The trial court shall issue a peremptory writ of mandate directing the City to set aside approval of the project. Costs are awarded to petitioners.[3]

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Wiseman, Acting P.J.

WE CONCUR:

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Gomes, J.

_____
Dawson, J.

[3]Petitioners also request reasonable attorney fees, although they fail to do so through a proper motion with supporting authorities and declarations. (See Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2003) ¶ 14:119, p. 14-27.) We therefore leave the issue for the trial court.